

STATE OF MICHIGAN
COURT OF APPEALS

EDWINA BROWN,

Plaintiff-Appellee,

v

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

UNPUBLISHED

October 28, 2004

No. 248059

Court of Claims

LC No. 02-000255-MD

Before: Griffin, P.J., and Saad and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right the trial court’s order denying its motion for summary disposition on the basis of governmental immunity. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries when a piece of wood fell from the underside of the Greenfield Road overpass and struck her vehicle as she drove underneath the overpass on I-96. She filed suit alleging, among other things, that defendant breached its duty to repair and maintain the improved portion of Greenfield Road by allowing water and ice to filter to the bottom of the roadbed, thereby causing the wood positioned underneath the roadbed to deteriorate and fall from the overpass. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that plaintiff failed to plead a claim in avoidance of governmental immunity in that she failed to allege that a defect in the traveled portion of I-96 proximately caused her injuries. The trial court denied the motion, concluding that issues of fact existed as to whether defects existed in the Greenfield Road roadbed and, if so, whether those defects proximately caused plaintiff’s injuries.

We review a trial court’s decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Generally, a governmental agency is immune from tort liability for actions taken in furtherance of a governmental function. MCL 691.1407. There are several exceptions to governmental immunity, including the highway exception. This exception requires a governmental agency having jurisdiction of a highway to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” MCL 691.1402(1). MCL 691.1402(1) imposes duties and liability on state and county road commissions only for the traveled portion, paved or unpaved, of a roadbed actually designed for public travel, and not for

installations outside the improved portion of the roadway. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 180; 615 NW2d 702 (2000). The highway exception is narrowly construed. *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000). Determination of the applicability of the highway exception is a question of law subject to de novo review. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

Assuming, without deciding, that defendant has jurisdiction over the improved portion of Greenfield Road,¹ we hold that plaintiff has stated a cause of action not barred by governmental immunity. In her complaint, plaintiff contends that defendant breached its duty to repair and maintain the improved portion of Greenfield Road by allowing water and ice to filter to the bottom of the roadway, thereby causing the wood positioned underneath the roadbed to

¹ At this juncture there is a genuine issue of material fact regarding jurisdiction of the improved portion of Greenfield Road at the I-96 overpass. Defendant's answer to plaintiff's request for admission states that Wayne County, not defendant, had jurisdiction over the Greenfield roadway:

6. [Plaintiff's Request for Admission to Defendant.] The State of Michigan, Department of Transportation, maintains sole jurisdiction regarding repair and maintenance of the subject bridge that is Greenfield road over Interstate 96.

ANSWER: The same is denied in that Wayne County Department of Public Services has jurisdiction over Greenfield Road and pursuant to Agreement 68-1655 dated July 25, 1969 Wayne County repairs, replaces and is responsible for a large portion of this structure.

However, in opposing defendant's motion for summary disposition, plaintiff submitted the affidavit of Bryan Zoltowski, which contradicts defendant's position on the issue of jurisdiction:

4. The area where the alleged incident occurred is **not** under the jurisdiction of Wayne County and was **not** under the jurisdiction of Wayne County on or about December 4, 2001, when and where the accident is alleged to have occurred in this case.

5. On or about December 4, 2001, the Greenfield Road bridge over I-96 was under the jurisdiction of the State of Michigan. [Emphasis in original.]

In arguing against defendant's motion for summary disposition, plaintiff's counsel relied on the Zoltowski affidavit and stated: "the engineer for the County of Wayne states that the entire road is in fact a jurisdiction of the State of Michigan. The Defendant, the State of Michigan, in this case has not filed any sort of support as to in [sic] the engineering area as to what part of the roadbed is maintained by the state and what part of the roadbed is maintained by the county." Based on the contradictory evidence, an issue of fact existed as to jurisdiction.

deteriorate and fall from the overpass. In particular, paragraph 10 of plaintiff's complaint alleges the following breach of duty to maintain and repair the traveled portion of Greenfield Road, which proximately caused the accident:

10. That said road, atop, contained potholes, unreasonable separations, and other openings due to neglect in maintenance and repair causing the accumulation of water, snow, ice and other precipitation to easily filter to the bottom of the same, and causing said wood upon contact with said accumulation to dismantled[sic] from the bridge, foreseeable[sic] contacting drivers operating vehicles on Interstate 96.

Because this allegation asserts a breach of the duty to repair and maintain the roadway itself, plaintiff has pled a claim in avoidance of governmental immunity.² *Nawrocki, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell

² In denying defendant's motion for summary disposition, the lower court did not rule on the factual sufficiency of the claim: "... motion is denied without prejudice because at this point we need to find out exactly what the defect is in the road above, in terms of whether or not there's some defect in the surface, as Mr. Collins [plaintiff's counsel] has intimated here, or whether it's just the bottom of it."